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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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No. 77-510

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

STATE OF NEW MEXICO,  
*Respondent.*

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**MOTION FOR LEAVE TO FILE BRIEF  
AS AMICI CURIAE AND  
BRIEF AMICUS CURIAE OF  
NATIONAL WILDLIFE FEDERATION  
AND NEW MEXICO WILDLIFE FEDERATION**

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### MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 42(3), the National Wildlife Federation, with its principal office at 1412 16th Street, N.W., Washington, D.C. 20036, and the New Mexico Wildlife Federation, with its principal office at 300 Val Verde, S.E., Albuquerque, New Mexico, 87108, move the Court for leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in the above-captioned case. Petitioner United States has consented to the filing of this brief; Respondent State of New Mexico has refused its consent.

The National Wildlife Federation, a nonprofit membership corporation organized under the laws of the District of Columbia in 1939, is dedicated to the restoration, wise use, and perpetuation of the natural resources of North America, including the public resources of the National Forests. The Federation is the world's largest

conservation organization with a combined membership of over two million persons. Members of the Federation regularly use and enjoy the water resources of the National Forests for fishing, hunting, camping, boating, photography, study and other forms of outdoor recreation. As a group these individuals comprise a substantial number of public users of the National Forests.

The National Wildlife Federation has been involved with protection of the water resources of the National Forests on several fronts, including: testimony in support of comprehensive forest management legislation; administrative action limiting timber cutting to protect the Bachman's Warbler, an Endangered Species; publication of numerous articles in *National Wildlife Magazine* and *Conservation News* dealing with National Forest and water issues; submission of recommendations to the President's Water Resource Policy Study regarding use of the federal reserve rights doctrine for minimum stream-flow protection.

The New Mexico Wildlife Federation is a nonprofit organization incorporated under the laws of the State of New Mexico and dedicated to the wise use, preservation, aesthetic appreciation and restoration of wildlife and other natural resources. The New Mexico Wildlife Federation has a membership of approximately 4,840 individuals, many of whom regularly use and enjoy the water resources of the Gila National Forest for fishing, hunting, observation, and other forms of outdoor recreation.

This case presents a general issue of great and continuing concern to the National and New Mexico Wildlife Federations and to other public users of the National Forests: the maintenance of an adequate supply of water of sufficient quality to protect the public's interest in the public forest lands and resources. In the present case the specific question is whether the United States is entitled to reserved water rights in the Gila National Forest to

protect instream uses of water, including watershed management, fish and wildlife propagation, recreation, livestock watering, fire protection, endangered species protection, and vegetative growth. The New Mexico Supreme Court denied the United States a priority water right for these uses, holding that the Organic Administration Act of 1897, 16 U.S.C. 475, did not include minimum instream flows or recreational water uses within its express purposes. This holding, based upon a sweeping—and, we submit, erroneous—interpretation of the 1897 Organic Act, extends far beyond the boundaries of the Gila National Forest; it threatens the ability of the Forest Service to manage water supplies in the public interest on approximately 187 million acres of reserved forest lands nationwide.

The National and New Mexico Wildlife Federations submit the attached brief to articulate and defend the substantial public interest affected by this decision.

Respectfully submitted,

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**BRIEF AMICUS CURIAE OF  
NATIONAL WILDLIFE FEDERATION  
AND NEW MEXICO WILDLIFE FEDERATION  
IN SUPPORT OF THE PETITION FOR CERTIORARI**

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**INTEREST OF AMICI CURIAE**

The interest of the National Wildlife Federation and the New Mexico Wildlife Federation is set forth in the Motion For Leave To File Brief As Amici Curiae, attached hereto.

**REASONS FOR GRANTING THE PETITION**

There are three separate grounds upon which the Petition For Certiorari should be granted: (1) the decision below is in conflict with this Court's opinion in *Arizona v. California*, 373 U.S. 546, (1963) decree entered, 376



U.S. 340 (1964); (2) the issue presented is nationally important, involving the constitutional authority of the United States to reserve land and water for public purposes; and (3) the New Mexico Supreme Court erred in its interpretation of federal law (i.e. the Organic Administration Act of 1897, 16 U.S.C. 475), and the decision of this Court in *Cappaert v. United States*, 426 U.S. 128 (1976).

### 1. Conflict

Rule 38(b) establishes "probable conflict" between a decision of the highest state court and this Court on a federal question as the principal ground for the grant of a petition for certiorari. Such a conflict is involved in the instant case.

In *Arizona v. California*, *supra*, this Court decreed that the United States has reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest" 376 U.S. at 350. This decree was based upon the Special Master's Report which found that the Gila National Forest was established for the following purposes: (1) The protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. Report of Special Master Simon H. Rifkind, p. 96. (Dec. 5, 1969) (emphasis added).<sup>1</sup>

The New Mexico Supreme Court found exactly the opposite:

We thus conclude that the original purpose for which the Gila National Forest was created were to insure favorable conditions of waterflow and to furnish a

<sup>1</sup> These findings were specifically adopted by the Court. 373 U.S. at 601 (1963).

continuous supply of timber. *Recreational purposes and minimum instream flows were not contemplated. Mimbres Valley Irrigation Co. v. Salopek*, 564 P2d 615, at 617 (1977) (emphasis added).

Moreover, the New Mexico Supreme Court's interpretation of the 1897 Organic Act, i.e. that it does not include recreational purposes, is in conflict with the decisions of other federal courts. Cf. *United States v. Alpine Land and Reservoir Co.*, (unreported) D-183 BRT (D. Nev. 1975) (Forest Service claim to instream flows dating from creation of forest upheld); *Glenn v. United States*, (unreported) No. 153-61 (D. Utah 1963), (1897 Organic Act authorizes the United States to use forest water for recreational purposes).

In the face of these "probable"—indeed, near certain—conflicts, the petition for certiorari must be granted. *United States v. Oregon*, 366 U.S. 643, 645 (1961).

### 2. Importance

Even in the absence of conflict, the importance of the federal question presented in this case warrants review by this Court. *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961). First, the issue presented involves the application and effect of the constitutional doctrine of federal reserved water rights. The importance of this doctrine to the management of federal lands in the arid and semi-arid regions of the west has been emphasized repeatedly by this Court. Cf. *Arizona v. California*, *supra*; *Cappaert v. United States*, *supra*.

Second, the public interest in the use and enjoyment of the National Forests is directly involved. The effect of the decision below is to deny public recreational uses of the forest the protection of the reserved rights doctrine. This Court has consistently recognized that lower court decisions involving the use of the public lands are sub-

ject to special scrutiny. *United States v. Coleman*, 390 U.S. 599, 601 (1968).

Third, the question whether the 1897 Organic Act includes minimum streamflows and recreational uses among its purposes, though not novel, is still the subject of confusion among the state courts. Two cases pending before the Idaho Supreme Court illustrate the point. In *Soderman v. Kackley* (No. 12482), the Sixth Judicial District Court of Idaho found that the Forest Service was entitled to its claim of a non-consumptive use of the entire natural flow of three streams in the Coeur D'Alene National Forest. By contrast, the First Judicial District Court of Idaho, in *Avondale Irrigation District v. North Idaho Properties*, (No. 12174), denied a similar Forest Service claim, holding that non-consumptive (i.e. instream) uses were not within the purposes for which the Caribou National Forest was created.

These conflicting opinions constitute a hindrance to the effective administration of federal law, particularly the McCarran Amendment, 16 U.S.C. § 466, which grants the states concurrent jurisdiction to adjudicate federal water rights, including reserved rights. *United States v. Eagle County District Court*, 401 U.S. 520 (1971). Under these circumstances, the guidance of this Court would be beneficial to the lower courts—state and federal. *Rothensies v. Electric Battery Co.*, 329 U.S. 296 (1945).

### 3. Error

In holding that the Organic Administration Act of 1897 did not include instream and recreational uses of water among the purposes for which National Forests were to be established and administered, the New Mexico Supreme Court simply ignored the plain meaning of the statute. The language of the Organic Act is all-encompassing in its description of such purposes:

No National Forest shall be established, except to *improve and protect* the forest, or for the purpose of securing *favorable conditions of waterflows*, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States.

Clearly, utilizing streamflows for fish and wildlife propagation, recreation, fire protection, watershed management, livestock watering, and a host of other instream uses are designed to "improve and protect" the forest, within the meaning of the above-quoted provision. Moreover, it is difficult to envision a more appropriate way to secure "favorable conditions of waterflows" than by insisting on a minimum level of streamflow.

### CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant the petition for certiorari.

Respectfully submitted,

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December 1977